EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

R. ALLEN CHILDRESS,

PETITIONER,

v.

THOMAS S., appt't guardian ad litem,
JOYCE BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

EDWARD G. CONNETTE, III
Harper & Connette
730 East Trade Street, Suite 200
Charlotte, North Carolina 28202
(704) 372-2830

ROGER MANUS
Carolina Legal Assistance
Post Office Box 2446
Raleigh, North Carolina 27611
(919) 834-0723

THEODORE O. FILLETTE, III
Legal Services of Southern Piedmont, Inc.
951 S. Independence Boulevard, Suite 600
Charlotte, North Carolina 28202
(704) 376-1608

QUESTION PRESENTED

I. IS PETITIONER, WHO WAS APPOINTED IN HIS OFFICIAL CAPACITY AS A STATE EMPLOYEE TO SERVE AS RESPONDENT'S GUARDIAN, A PROPER PARTY IN THIS §1983 ACTION AFTER ADMITTING IN HIS ANSWER THAT HE ACTED UNDER COLOR OF STATE LAW?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

INDEX OF AUTHORITIES iii

STATEMENT OF THE CASE 1

ARGUMENT 3

A. The petitioner admitted as a fact that he acted under color of state law with respect to respondent's claim under 42 U.S.C. §1983; therefore, the court had subject matter jurisdiction under 28 U.S.C. §1343(3). . . 3

B. The petitioner is a necessary party for complete relief because he has statutory control over Thomas' liberty 4

C. The court has jurisdiction over the petitioner under Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) and other authorities cited by petitioner 5

CONCLUSION 7

APPENDIX

RESPONDENT'S AMENDED COMPLAINT, and PETITIONER'S ANSWER (Excerpt) A-1

INDEX OF AUTHORITIES

TABLE OF CASES PAGE

Hagans v. Lavine, 415 U.S. 528 (1974) 4

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) 5, 6, 7

Maine v. Thibotot, 448 U.S. 1 (1980) 4

Polk County v. Dodson, 454 U.S. 312 (1981) 4, 7

Thomas S. v. Morrow, 601 F.Supp. 1055 (W.D.N.C. 1984) aff'd 781 F.2d 367 (4th Cir. 1986). 1, 2, 6

Youngberg v. Romeo, 457 U.S. 307 (1982). 2, 4

STATUTES

28 U.S.C. §1343(3) 3, 4

42 U.S.C. §1983 . . . . . 3, 4, 5

N.C.G.S. § 35-1.6 7

NO. 85-1895

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1985

R ALLEN CHILDRESS,

PETITIONER,

v.

THOMAS S., appt't guardian ad litem
JOYCE BROOKS,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondent Thomas S. respectfully requests this Court to deny the Petition for a Writ of Certiorari seeking review of the Fourth Circuit Court of Appeals' judgment in this case, as reported at 781 F.2d 367.

STATEMENT OF THE CASE

A. STATEMENT OF FACTS

The decision of the Court of Appeals, reported at 781 F.2d 367, Petition, Appendix A-1, contains a thorough statement of facts accurately gleaned by the court from the voluminous record in this case. Respondent's summary of facts in his Brief in Opposition to a Petition for Writ of Certiorari filed by another party, Philip J. Kirk, under docket no. 85-1590 also contains a more succinct but entirely consistent statement of facts. Respondent adopts and refers to the statement of facts of the Court of Appeals, Petition, Appendix A-1.

B. HISTORY OF THE CASE

Petitioner Childress' Petition follows a related petition filed by his co-defendant, Philip J. Kirk, under docket no. 85-1590. That Petition for a Writ of Certiorari was DENIED in an order dated May 19, 1986. ____ U.S. ____.

On July 7, 1982, Thomas S. brought suit against Sarah Morrow, then Secretary of the North Carolina Department of Human Resources (DHR); against DHR employee Allen Childress, in his offical capacity as Thomas' guardian; and against the directors of two local agencies, the Gaston County Department of Social Services and the Gaston-Lincoln Area Mental Health Program.

The complaint alleged that defendants had denied Thomas' substantive due process rights under the Fourteenth Amendment for failure to provide minimally adequate treatment, that Thomas'

hospitalization imposed a degree of restraint on his liberty inconsistent with professional judgment concerning his treatment needs, and that improper treatment violated various state law provisions. An amended complaint later alleged that defendants had deprived Thomas of substantive liberty interests created by state law. Thomas requested injunctive relief requiring defendants to place him in an appropriate treatment setting and to provide other treatment recommended by professionals who had examined and worked with him. Unlike the plaintiff in Youngberg v. Romeo, 457 U.S. 307 (1982), Thomas sought no damages.

On December 7, 1984, the district court entered a final judgment requiring Kirk and Childress to develop a treatment plan for Thomas. Thomas S. v. Morrow, 601 F.Supp. 1055, (WDNC 1984). It further directed these defendants to furnish Thomas with treatment recommended by the qualified professionals who had evaluated his needs, including suitable residential placement and non-residential services. Id.

The defendants appealed, and the district court judgment was unanimously affirmed on January 9, 1986, in a decision reported at 781 F.2d 367 (Petition, App., A). Thereafter, defendant Kirk's petition for rehearing and his motion for stay of mandate were denied by the Court of Appeals. Kirk's Petition for Writ of Certiorari was denied under docket no. 85-1590, ____ U.S. ____.

Kirk's co-defendant, Allen Childress, has now filed a Petition for Writ of Certiorari, and Respondent submits this brief in opposition.

ARGUMENT

THE COURT HAD AUTHORITY TO ENFORCE PLAINTIFF'S CONSTITUTIONAL RIGHTS AGAINST THE PETITIONER, AND THE PETITIONER IS A NECESSARY PARTY FOR AFFORDING COMPLETE RELIEF.

Thomas' state-appointed guardian, defendant Allen Childress (the Petitioner), does not argue that DHR has provided Thomas with the minimally adequate treatment prescribed for him, nor does the Petitioner complain that the relief ordered by the court was unnecessary or contrary to the Petitioner's plans for Thomas. Basically, the Petitioner objects to being made a party defendant on technical grounds. For the reasons summarized below, however, his Petition has no merit.

A. The petitioner admitted as a fact that he acted under color of state law with respect to respondent's claim under 42 U.S.C. §1983; therefore, the court had subject matter jurisdiction under 28 U.S.C. §1343(3).

The Petitioner seeks to challenge the court's subject matter jurisdiction by claiming that he has not acted under color of state law within the meaning of 42 U.S.C. §1983. He seeks to escape his judicial admission in paragraph 36 of the Amended Answer -- that he had acted under color of state law -- by reference to various cases discussing requirements for jurisdictional state action that are inapplicable to the facts of this case. Respondent's Appendix A, ¶36.

The Petitioner has confused the requirements of subject matter jurisdiction under 28 U.S.C. §1343 with the statement of a colorable claim for relief under the remedial statute, 42 U.S.C.

§1983. Clearly, 42 U.S.C. §1983 provides a substantive right of action and is not jurisdictional. Hagans v. Lavine, 415 U.S. 528, 535 (1974). Actions under §1983 may be entertained in state courts as well as federal. Maine v. Thibotot, 448 U.S. 1 (1980).

Whether a party has acted under color of state law for purposes of stating a claim under §1983 is a question of fact that must be determined in each case. Polk County v. Dodson, 454 U.S. 312 (1981). If the Petitioner here wished to contest that fact, he should have denied the allegations and moved to dismiss the §1983 claim under Rule 12(b)(6).

With the Petitioner's admission that he acted under color of state law, it is clear that respondent stated a colorable claim against him under §1983. Respondent alleged that the Petitioner wrongfully kept Thomas institutionalized at Broughton Hospital contrary to defendant's professional judgments and thereby restricted his liberty. Certainly that stated a claim under §1983. Youngberg v. Romeo, supra. Having stated a colorable claim against the petitioner under §1983, the respondent invoked the subject matter jurisdiction under 28 U.S.C. §1343(3).

B. The petitioner is a necessary party for complete relief because he has statutory control over Thomas' liberty.

Rule 19 of the F.R.C.P. requires the joinder of every person if in his absence complete relief cannot be accorded. Because Petitioner has the statutory power to make virtually all decisions affecting Thomas' liberty -- including his residence

and participation in treatment -- he is a necessary party. The fact that the Petitioner appears to favor respondent's substantive claims here does not negate the possibility that he may not always do so, nor does it negate the fact that he placed and maintained Thomas in Broughton Hospital inappropriately and in violation of his liberty interests.

Respondent recognizes the lack of resources afforded to the Petitioner by defendant Kirk and the state statutes. Nevertheless, if Kirk were left as the only party defendant, he might escape compliance with the court's orders if the petitioner refused to make Thomas available for appropriate residential placement and treatment. On the other hand, if the petitioner remains as a defendant and obeys his responsibility to Thomas, he has lost nothing. He is not subject to liability for damages (and Thomas seeks none), and defendant Kirk is paying for his separate attorney. Ironically, the petitioner's true independence from defendant Kirk will probably be strengthened by his remaining subject to the court's orders. His strong advocacy for Thomas may otherwise be more suspect in the eyes of his employer (Kirk). In short, there is no legal or equitable reason for removing the Petitioner from this action.

C. The court has jurisdiction over the Petitioner under Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) and other authorities cited by Petitioner

Petitioner claims the the Fourth Circuit misinterpreted Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) and other authori-

ties in finding jurisdiction over him under 42 U.S.C. §1983. As argued earlier, Petitioner had admitted in his answer to Respondent's complaint that his actions were under color of state law, so that the court did not need to consider the issue further. Nevertheless, its analysis of Lugar and other authorities was correct, and Petitioner's argument to the contrary is erroneous.

In the decision below, the court of appeals correctly identified the standard established by this Court in Lugar:

> In Lugar v. Edmondson Oil Co., the Court explained that "conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." The Court then outlined a two-part test for determining whether a defendant's acts may be attributed to the state. The first component of the test, the "under color of state law" requirement of §1983, is satisfied if the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible."
>
> . . . .
>
> The second component of the Lugar test of a cause of action under §1983 inquires whether the defendant "may fairly be said to be a state actor."
>
> 781 F.2d at 377 [citations omitted]

The court of appeals applied the Lugar standard by recognizing that the Petitioner's guardianship authority over Thomas S. is a "right or privilege created by the State," that the Petitioner's state-created authority is extremely broad, and that the Petitioner "has acted together with or has obtained significant

aid from the state." 781 F.2d at 377-378. The Petitioner was appointed to serve as guardian in his role as a state employee, and the court of appeals observed that he was absolved from personal liability for providing funds or resources for treatment. Id. The Petitioner's argument that the court of appeals improperly relied on Lugar is clearly wrong.

Similarly, Petitioner's reliance on Polk County v. Dodson, supra. is misplaced. In Dodson, a court-appointed attorney and other defendants denied that they were acting under color of state law. Further, the state-appointed attorney demonstrated an exceptional independence from the state grounded in the fact that the decision complained of (withdrawing as counsel) appeared to be compelled by the ABA Standards of Criminal Justice. Polk County v. Dodson, 454 U.S. at 322. Another distinction from Dodson is that the state-appointed attorney's insulation from the state's influence was guaranteed by the Sixth Amendment. Id. Here, the Petitioner claims that his "independence" is derived from the duty of loyalty to Thomas imposed by N.C.G.S. §35-1.6. However, this statute does not provide the Petitioner with any financial resources, independent of the state defendant Kirk, to place Thomas outside of Broughton Hospital and to give him the treatment that the Petitioner knew was needed. Thus, the Petitioner essentially acquiesced in the deprivations of Thomas' liberty required by the defaults of defendant Kirk.

CONCLUSION

Thomas is in critical need of the treatment ordered under the judgment. According to a letter to the district court from Petitioner's counsel:

> If appropriate treatment is not provided to Tom he will likely:
>
> a. Become a chronic inmate of Broughton Hospital; or
> b. Be warehoused and medicated in a rest-home for the indefinite future; or
> c. Get in trouble with the law; or
> d. Live or perish as a "street person."

Thomas has shown that he is constitutionally entitled to receive the treatment prescribed for him. The petition for certiorari should therefore be DENIED.

Edward G. Connette, III
Harper & Connette
730 East Trade Street, Suite 200
Charlotte, North Carolina 28202
(704) 372-2830

Roger Manus
Carolina Legal Assistance
Post Office Box 2446
Raleigh, North Carolina 27602
(919) 834-0723

Theodore O. Fillette, III
Legal Services of Southern Piedmont, Inc.
951 S. Independence Boulevard, Suite 600
Charlotte, North Carolina 28202
(704) 376-1608

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

Civil No. 82-418-M

THOMAS S., by his next friend, PAUL CALDWELL,

Plaintiff,

vs.

SARAH T. MORROW, Secretary, N.C. Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program; HARLEY B. GASTON, JR., DAVID BEAM, DAVID HOLLIFIELD, JAMES FORRESTER, DEAN CARPENTER, ROBERT HEAVNER, and PORTER McATEER, in their official capacity as Gaston County Commissioners,

Defendants.

AMENDED COMPLAINT

PRELIMINARY STATEMENT

1. Thomas S. is a nineteen year-old Broughton Hospital patient who cannot return home to Gaston County because there are no appropriate group homes or after-care facilities where he can receive the treatment he needs. He can communicate and possesses many self-care skills, but he is presently incapable of living independently because he is emotionally handicapped and borderline mentally retarded. Examinations by psychologists, vocational experts, social

movement, and freedom from restraint than is appropriate or indicated by professionals who have examined him. His continued hospitalization bears no rational relation to his initial placement there or to the treatment and other services for which a guardian was appointed to provide pursuant to N.C.G.S.§35-1.6 et seq.

35. Upon information and belief, there are other Gaston County residents whose treatment needs are similar to those of Thomas. Upon information and belief, the number of such other residents is sufficient to warrant the development of group treatment facilities needed by Thomas in Gaston County. The development of a small, community-based and homelike group treatment program in Thomas' home community will serve his treatment needs and will avoid the emotionally damaging instability and stigma that would result from placing him outside Gaston County in an existing facility in another county or state.

36. The defendants' conduct toward the plaintiff at all times relevant herein occurred under color of state law within the meaning of 42 U.S.C. §1983.

FIRST CLAIM FOR RELIEF

37. The defendants have failed to provide Thomas with minimally adequate treatment in a setting that offers the least intrusion on his personal liberty, freedom of movement, and freedom from restraint.

38. The defendants have undertaken to have Thomas declared incompetent and to have a state official

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

Civil No. C-C-82-0418-M

THOMAS S., by his next friend, PAUL CALDWELL, Plaintiff, v. SARAH T. MORROW, Secretary, N. C. Department of Human Resources; ALLEN CHILDRESS, in his official capacity as guardian for the plaintiff; BENJAMIN CARPENTER, Director, Gaston County Department of Social Services; JAMES MELTON, Director, Gaston-Lincoln Area Mental Health Program, Defendants.	AMENDED ANSWER OF DEFENDANTS MORROW AND CHILDRESS

Defendants Sarah T. Morrow and Allen Childress, answering the amended complaint in their official capacities, allege and say:

FIRST DEFENSE

The portions of the amended complaint pertaining to Defendants Morrow and Childress should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for the reason that the allegations pertaining to them as contained in such complaint totally fail to state a claim upon which relief can be granted.

33. Defendants deny the allegations contained in Paragraph 33 of the amended complaint.

34. Defendants deny the allegations contained in Paragrah 34 of the amended complaint.

35. Defendants lack information from which to form an opinion as to the truth or falsity of the allegations contained in Paragraph 35 of the amended complaint, and the same are therefore denied.

36. Defendants admit the allegations contained in Paragraph 36 of the amended complaint.

37. Defendants deny the allegations contained in Paragraph 37 of the amended complaint.

38. Defendants deny the allegations contained in Paragraph 38 of the amended complaint.

39. Defendants deny the allegations contained in Paragraph 39 of the amended complaint.

40. Defendants deny the allegations contained in Paragraph 40 of the amended complaint.

41. Defendants deny the allegations contained in Paragraph 41 of the amended complaint.

42. Defendants deny the allegations contained in Paragraph 42 of the amended complaint.

43. Defendants admit the allegations contained in Paragraph 43 of the amended complaint.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Supreme Court Bar, and that on the 18th day of June, 1986, I have served a copy fo the RESPONSE TO PETITION FOR CERTIORARI by placing the same in the United States Mail, first class postage prepaid, addressed to the following:

Robert H. Gage
Law Office of Cox and Gage
305 College Street
Morganton, North Carolina 28655

Cathy J. Rosenthal

William O'Connell

and

Wilson Hayman
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602-0629

Edward G. Connette, III
Harper & Connette
730 East Trade Street, Suite 200
Charlotte, North Carolina 28202